UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HONORABLE ARTHUR J. AMCHAN

SALEM HOSPITAL CORPORATION A/K/A THE MEMORIAL HOSPITAL OF SALEM COUNTY	:	
and	:	NLRB CASE NO. 04-CA-130032
HEALTH PROFESSIONALS AND ALLIED EMPLOYEES (HPAE)	: ;	

COMPLIANCE SPECIFICATION POST-HEARING BRIEF OF RESPONDENT SALEM HOSPITAL CORPORATION

Respectfully submitted,

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INTRODUCTION

In this Post-Hearing Brief, Salem presents its primary argument that each of the seven Claimants at issue should receive the two week mandatory payment required by the Board's enforced Order, and then some arguments in the alternative with respect to the backpay period if that primary position is not credited. To the extent that Salem's primary position that backpay for each of the seven Claimants at issue should be limited to the two-week payment, and one or more of the alternative arguments is credited, Salem requests that the computation of backpay pursuant to such arguments should be remanded to the Compliance Officer for calculation in the first instance.

Attachment to this Post-Hearing Brief as Attachment "A" is a summary of the relevant data produced by third party health care facilities in response to subpoena and presented as Respondent Exhibits at Hearing. Given that the data was created independently by the various third parties, the individual exhibits do not provides an "apples to apples" comparison of the RN staff positions posted and/or available during each month of the alleged backpay period. The summaries in Attachment "A" identify the categories of positions and provide a count of the positions posted and/or available which Salem contends were substantially equivalent positions for which the Claimants could have applied.

Throughout this Brief, the term "Former Employees" is used with reference to the five Claimants at issue who left employment with Salem in June, 2014. They are: Jill Cottrell, Renee Garrison, Betty Moore, Linda Sibley, and Maria Soone. It is worthy of note in connection with several of the arguments below that Jill Cottrell transferred to a position in the Operating Room at Salem upon closure of the OB unit, and resigned one week later than the others. Although she is considered a "Reassigned Employee" in the Board's Order, she is referred to in this Brief as a "Former Employee" for ease of distinction from the two per diem "Reassigned Employees" who are still employed at Salem. Those "Reassigned Employees" are Esperanza ("Hope") Driver and Gail Kirkwood.

The abbreviation "RN" is used to refer to licensed registered nurses, as opposed to "LPN", which is used to refer to licensed practical nurses. The term "Union" refers to the Charging Party HPAE. The Respondent, Salem Hospital Corporation, is alternately referred to as "Salem" or "the Hospital". The abbreviation "OB" refers to the medical practice of Obstetrics, which is sometimes also referred to as "L&D", or "Labor and Delivery".

Finally, references to the Transcript of Hearing held in this Compliance Specification December 5th, 6th, 7th, 12th, 13th and 14th are indicated by a "T" followed by page number. General Counsel's exhibits are referenced as "GC.Ex." followed by exhibit number. Respondent Salem's exhibits are referenced as "R.Ex." followed by exhibit number.

SUMMARY OF ARGUMENT

Compliance in this matter should not exceed the minimum *Transmarine* requirement of two week's pay to each of the 12 Claimants. The General Counsel concedes the two week minimum with regard to five of the twelve Claimants – two of whom transferred to other RN positions at Salem -- but continues to seek nearly $380,000.00 in backpay for the remainder. Of the seven remaining Claimants, two are still employed at Salem as per diem nurses (Driver and Kirkwood); four left the employ of Salem upon the closure of the OB unit (Garrison, Moore, Sibley and Soone); and one resigned from Salem after transferring for one week to the Surgery department and deciding she did not like it (Cottrell).

Looking first at the five Claimants who left the employ of Salem, each and every one of them had the opportunity to transfer to a comparable RN position at Salem Hospital upon closure of the OB unit. As noted above, Jill Cottrell in fact did accept a transfer before resigning. Her resignation constitutes a voluntary forfeiture of wages, which should immediately toll backpay. The others rejected transfer and chose the option of leaving with a severance package and no contest of unemployment compensation. Their decisions to leave Salem instead of accepting reassignment to substantially equivalent jobs also constitutes voluntary forfeiture of wages, and cannot now be twisted into a justification for backpay under *Transmarine*.

The Claimants testified cogently that they had left Salem rather than work as RNs in other departments of the Hospital because they simply did not want to work in those departments – not because they were unqualified, or would need more than a minimal period of training and re-orientation on paid time; not because there would be any change in wages or benefits – but because they preferred to care for OB patients. That preference does not warrant subsidy by the Hospital under a *Transmarine* remedy.

After leaving Salem, the Former Employees – Cottrell, Garrison, Moore, Sibley and Soone - failed to satisfy their obligation to conduct a reasonable search for, and make reasonable efforts to apply for, substantially similar positions. A mountain of evidence shows that they were qualified to apply for anywhere from 115-221 of RN positions available in the geographic area every month of the alleged backpay period, at similar and higher rates of pay. In fact, there were a total of over 2,000 RN positions posted on area hospital websites throughout the alleged backpay period. Yet, although these positions were posted plainly online, the Claimants ignored them. With the exception of Moore, there is no independent evidence that any of them applied for a single position for weeks, and in some cases months. Unfortunately, the granting of Petitions for Revocation of subpoenas to third party health area healthcare facilities, and the denial of continuance to seek enforcement of subpoenas on 19 others deprives Respondent of the ability to demonstrate whether and when any of the Claimants applied for available positions in those facilities.

All except Moore focused their eventual searches on OB positions, albeit there was some limited exploration for positions outside of OB. Late in 2014, Sibley broadened her search and accepted a position in Home Health Care, but the limitation of her search to OB positions prior to November, 2014 disqualifies her from backpay from June through November. Garrison rejected a full time position as a Home Health Nurse in October, 2014, and then accepted a part time position as an OB nurse in November, not working fulltime until March, 2015. That rejections tolls backpay, as it constituted a voluntary forfeiture of wages. The periods during which the Former Employees either failed to search, limited their searches to OB positions, or rejected substantially equivalent employment does not merit backpay. In addition, their application for, and receipt of unemployment should not be accorded any *prima facie* presumption of reasonable search, because the evidence plainly demonstrates the opposite.

In the case of Betty Moore, where the government seeks backpay of over $116,000.00, again, she admitted that she had no interest in working as an RN in any other department at Salem, told her Director as much, accepted severance, and decided to take a part time job as a school bus nurse at roughly half the hours she regularly worked and a nearly 30% reduction in pay. The preponderance of the evidence shows that Moore essentially made a choice not to search for substantially equivalent work, which resulted in a forfeiture of her rights to any backpay beyond the two-week minimum.

The reassigned per diem Claimants — Driver and Kirkwood — who transferred to OR and Same Day Surgery, respectively, experienced a reduction in hours worked following the closure of the OB unit by their own choice, consistent with the "tiers" of the per diem program at the Hospital. The selection of the number of days per month a per diem RN makes herself available is a voluntary choice made by the nurse, and the hourly rate of pay for per diem work is defined by the number of hours of work to which the per diem nurse commits. Both Driver and Kirkwood could have worked additional hours, but decided against doing so for personal reasons. Driver's claim that she was effectively forced to reduce her per diem tier by a denial of training lacks credibility and should not be credited. Kirkwood explained that her choice was made in order to balance hours worked at another facility, where pay was higher. The fact that personal choices resulted in Driver and Kirkwood working fewer hours simply does not give rise to an obligation for backpay.

With regard to the alleged backpay period of 500 days, in addition to the arguments for the tolling of backpay set forth above, Salem contends that any backpay period should be reduced to no more than sixteen weeks because the Union failed to bargain in good faith. In roughly 16 collective bargaining sessions from April through November of 2016, the Union neither mentioned nor made a single proposal with regard to OB closure effects, even though issues related to job transfer, layoff and reinstatement were negotiated and tentatively agreed upon. Thus, the Union's failure to advance the demand to bargain should toll any backpay period as of the initiation of face to face negotiations on April 11, 2016. Although the government's witnesses drew an imaginary line in the sand between bargaining an initial contract and addressing the effects of the OB closure, there is no such distinction required by the Board's enforced Order. Moreover, evidence clearly demonstrated the fallacy of the GC's

witnesses' contention that they could not bargain without a formal response to requests for information largely already in their possession when they requested it. Alternatively, Salem argues that any backpay period was tolled by its June 9, 2016 offer to bargain about the effects of the closure transmitted by email from its chief negotiator, and the Union's failure to respond by any means that actually reached Salem's chief negotiator.

Finally, Salem argues that its due process rights were compromised and that it was prejudiced by (1) the denial of a continuance to present a critical witness found on the last day of Hearing; (2) the granting of three Petitions to Revoke Subpoenas of area hospitals who would have produced yet more evidence of substantially similar RN positions for which the Claimants were qualified and failed to apply; and (3) the denial of a continuance for the General Counsel's enforcement of subpoenas issued to custodians of record at 19 other area healthcare facilities who simply did not reply to the subpoenas, and who similarly would have produced evidence of the Claimants' failure to search for comparable employment. In addition, Salem was further prejudiced by the Region's failure to obtain timely affidavits and information from the Claimants regarding their job searches consistent with the NLRB CaseHandling Manual. In this regard, the Compliance file was devoid of any actual evidence of job search beyond the understandably vague recollections of the Claimants which were obtained three and a half years after the closure of the OB unit.

ARGUMENT

I. The Remedy For The Former Employees Should Be Limited To The Two Week Minimum Guarantee Set Forth in The Third Circuit's Judgment.

As noted in the Compliance Specification, the Third Circuit issued a judgment fully affirming the Board's Order to calculate backpay in accordance with Transmarine Navigation Corp , 170 NLRB 389, 390 (1968). *(*hereafter "*Transmarine*"). Specifically, Salem was directed to pay the Former Employees their normal wages while in Respondent's employ from 5 days after the date of its December 2, 2015 Order until the occurrence of the earliest of the following conditions: (1) it bargains to agreement with the Union about the effects of the closure of the obstetrics unit; (2) the parties reach a bona fide impasse in bargaining; (3) the Union fails to

request bargaining within 5 days after receipt of the Board's Order, or to commence negotiations within 5 days after receipt of Respondent's notice of its desire to bargain with the Union[1]; or (4) the Union subsequently fails to bargain in good faith.[2]

In addition, by the terms of the Board's enforced Order, (1) none of the Former Employees may be paid backpay in an amount that would exceed what she would have earned as wages from the date of termination to the time she secured equivalent employment elsewhere, or the date on which Salem shall have offered to bargain in good faith, whichever occurs sooner; and (2) each of the Former Employees are entitled to "no less than what each of them would have earned for a two week period at the rate of their normal wages plus interest". (GC 1(d), P. 1-2).

It is well settled law that an employer's backpay liability may be reduced if an employee "fails to remain in the labor market, refuses to accept substantially equivalent employment, fails diligently to search for alternative work, or voluntarily quits alternative employment without good reason." NLRB v. Mastro Plastics Corp., 354 F. 2d 170, 174 n.3 (2d Cir. 1965) cert. denied, 384 U.S. 972, 86 S. Ct. 1862, 16 L. Ed. 2d 682 (1966), accord, NLRB v. Madison Courier, Inc., 153 U.S. App. D.C. 232, 472 F. 2d 1307, 1317 (1972).

Salem contends in the first instance that the rejection of the transfer opportunities offered by the Hospital prior to – and in lieu of – separation from employment by four of the five Former Employees (Moore, Garrison, Sibley and Soone) toll backpay immediately as of the date of their separation from employment – June 1, 2014. Their rejection essentially constitutes " a refusal to accept substantially similar employment" in keeping with NLRB v. Mastro Plastics Corp., supra. Similarly, the resignation by the 5th of the Former Employees (Cottrell) after acceptance of transfer and work for one week in the Operating Room Department ("OR")

[1] As set forth in Argument Point III below, Salem contends that the Union failed to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union.

[2] As set forth in Argument Point III below, Salem contends that the Union failed to bargain in good faith by its abandonment of the December 4, 2015 demand to bargain about the effects of the OB closure during nearly a full year of collective bargaining negotiations.

should toll backpay as of the date of her separation from employment one week later, as it constitutes a "voluntary quit of alternative employment without good reason", in keeping with NLRB v. Mastro Plastics Corp., supra. (T. 354-358). In addition, to the degree that Salem's primary position is not credited, Salem argues that any backpay awarded to the Former Employees should be limited to the two week minimum guarantee because they failed to engage in a reasonable search for substantially equivalent employment.

A. Backpay Should Have Been Tolled Immediately For All Former Employees Who Chose To Terminate with Severance In Lieu Of Transfer To RN Positions In Other Salem Hospital Departments.

a. The RN Positions In Other Departments At Salem Were Substantially Equivalent to RN Positions in the OB Department.

A central issue in this case – both with respect to the Former Employees' rejection of transfer to RN positions in other Nursing Departments at Salem, and with respect to the sufficiency of the Former Employees' search for employment outside of Salem – is the question of whether RN positions in areas other than OB constitute "substantially equivalent employment". The Hospital Departments into which the Former Employees could have transferred – and into which Claimants Cottrell, Drennan, Kille, Driver and Kirkwood did transfer – included OR, PACU, Same Day Surgery, Medical/Surgical ("Med/Surg"), Med/Surg/Pediatric, Emergency Department ("ED") ,Telemetry and ICU. (T. 354-358, 709, 716, 719, 721, 1052, 1056, 1057, 1062).

Counsel for the General Counsel contends that the universe of substantially equivalent employment for the Former OB nurses is limited to RN positions in OB units. But that position argues in favor of an unprecedented principle which is wholly inconsistent with the Board's adoption of its "Health Care Rule". Specifically, on April 21, 1989, the Board, after engaging in nearly two years of rulemaking, including hearing from 144 witnesses and over 1800 commentators, adopted its "Health Care Rule", defining the appropriate bargaining units

in the health care industry, a landmark endeavor which was upheld by the Supreme Court almost two years to the day later in *American Hospital Association v. N.L.R.B.*, 499 U.S. 606, 111 S.Ct. 1539, 113 L.Ed.2d 675 (April 23, 1991).

The Board's Health Care Rule, 29 CFR Part 103, 54 FR No. 76, 284 NLRB 1580 (April 21, 1989), provides, *inter alia*, that one of the "only appropriate" collective bargaining units in the health care industry shall be "All Registered Nurses."

In the instant case, the Counsel for the General Counsel argues for the proposition that, for remedial purposes in a compliance specification proceeding, Your Honor should split hairs between and among the assorted skill sets possessed by (let alone required for the licensure of) Registered Nurses. The proposition advanced by the Counsel for the General Counsel in the instant case for the purposes of Section 10 of the Act could be no more at odds with the core of the Board's Health Care Rule which recognizes that, for the purposes of Section 9 of the Act, Registered Nurses share such a high degree of communal interest with each other – without parsing between and among special skills which one or another of the nurses might possess but others do not – that they perform, for all intents and purposes, the same indispensable service: patient care, no matter the patient's acuity or the unit in which the patient may reside for the moment.

Moreover, the compelling testimony of the Hospital's witnesses – and the actual experience of 8 of the Claimants – both those who accepted transfer to other departments at Salem and those who accepted employment as RNs outside of OB for other employers-- puts the lie to the government's notion that substantially equivalent work for RNs who worked in

the OB department is limited to RN positions in that small, limited area. [3] So do the very proposals proffered by the HPAE in negotiations, which included (1) Hospital-wide bumping rights for RNs – -such that, in a layoff situation, an OB nurse with greater seniority could "bump" the least senior nurse in any other department, (2) preferential transfer of nurses to positions in other Hospital departments as long as they could orient to a new department in 90 days, and (3) a single job classification of registered nurse. (T. 761, 763-5, 772-3, 777, 784-5; R. Ex. 10, 11, and 12).

In Floca v. Homcare Health Servs., Inc., 845 F.2d 108, 111–12 (5th Cir. 1988), the Court defined substantially equivalent employment as that which "affords virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status as the position from which the Title VII claimant has been discriminatorily terminated." Id. at 1138. Here, the Record shows amply that wages, hours and working conditions in all of the Nursing Departments at Salem were indeed virtually identical.[4] (T. 699- 701, 717, 1065, 1079, R. Ex. 29-35, 43).

In the field of nursing, the Board has held that RN positions in different areas of specialization are substantially equivalent. Specifically, in Norton Health Care Inc., 350 NLRB 648, 656 (2007), the Board determined that a Med/Surg RN position was substantially equivalent to the "lactation consultant" position previously held by the RN discriminatee. In holding that reinstatement to a Med/Surg RN position became valid when the formerly available position of lactation consultant was effectively abolished, The Board stated:

"Although Sandusky [the Claimant] testified that she did not believe she could handle the physical demands of a med/surg nurse position, Clark, who is of similar size and age, testified that she

[3] Note that Counsel for General Counsel sought to exclude evidence regarding the Claimants for whom the Region seeks the minimum two week compensation required by the enforced Order. (T. 12-13). Yet, evidence of those Claimants having found substantially equivalent employment in positions outside of OB clearly supports Salem's position that the universe of substantially equivalent jobs for the Claimants cannot be limited to OB.

[4] Although the OR Department shifts were 8 hours instead of 12 hours, a FTE in those departments worked 40 hours per week – 5 shifts of 8 hours each – instead of three 12 hour shifts for a total of 36 hours per week. Nonetheless, the fulltime status is unchanged, as are benefits, and among the departments available to the Claimants for transfer were others which had the 12 hour shifts. (T. ___).

receives assistance from other staff members when necessary. Moreover, there are no height or weight restrictions for med/surg nurses… Not having worked as med/surg nurse for many years, Sandusky reasonably concluded that she would require reorientation for the position. Unquestionably, there were differences between her work with newborn babies and their mothers and the types of skills required of handling adult patients. However, the Respondent did offer Sandusky reorientation training. Sandusky assumed it would be a very lengthy process, **but** she made no inquiries of management to find out exactly what the reorientation would have entailed. I believe she had a duty of inquiry in those circumstances, to obtain more information from the Respondent rather than to base her conclusions solely on assumptions**.** From the uncontroverted testimony of management witnesses, it appears that such training might have lasted anywhere from 4 to 8 weeks, far less onerous than the year period that Sandusky testified she feared. Sandusky was an experienced RN and was offered an RN position, albeit not a specialized one, as she had previously held. I conclude that the med/surg position was "substantially equivalent" and, had there been no lactation consultant position at Suburban in July 2000, the offer of reinstatement made by the Respondent would have been valid." Id. At 656.

Here, as in *Norton Health Care*, Med/Surg positions were offered to the Former Employees – including by the former Director of OB who became the Director of Med/Surg -- as well as by the CNO. (T. 1056). The work of the Claimants in OB was no more specialized than that of the RN Lactation Consultant in *Norton Health Care.* Yet, but for the brief stint of Cottrell in the Operating Room, the Former Employees rejected the idea of working as an RN in any department at Salem once the OB unit closed. (T. 1062, T. 357-358, T. 472-3; T. 317-18; T. 386; T. 444).

Both Nancy Hampton, former Director of OB and current Director of Med/Surg and Pediatrics, Director of Nursing Supervisors, Transport and Patient Observation, and Interim Director of Telemetry Unit, and Pat Scherle, former CNO at Salem and current CNO at Chestnut Hill Hospital in Philadelphia, addressed the applicability of basic nursing skills across different departments, or areas of health specialization, and the training required to achieve proficiency when moving from one area to another. Specifically, Hampton, whose own 31 year career as a registered nurse prior to employment at Salem has included work as a staff OB nurse, management of a family practice residency program, and direction of an assisted living facility, compared the similarities and distinctions in practicing nursing in OB and Med/Surg as follows:

"I made a list of comparing the kind of patients that you would have in -- the OB unit is obviously patients coming in, in labor, having babies, taking care of the babies, and then

taking care of the mother and babies. But also in an OB unit, you have patients coming in with medical problems. If they're over 20 weeks gestation, that means they're more than equal to or over 20 weeks, then you would go to the med -- the OB floor. So we would have patients with seizures, dehydration, asthma, pneumonia, isolation patients, post-op with appendectomies, gallbladders, kidney infections, infectious diseases, flu, viral illnesses, withdrawal from alcohol, drugs, IV therapy, people on controlled pain medications. We'd occasionally get older females because we did what they call GYN surgery. So they had surgical patients: bladder surgery, hysterectomy, breast surgery. Cancer patients, if it was the female organs. And care of a patient with a miscarriage. …
A. And the same list I could make for the med/surg unit also. The same types of patients have those diagnoses, except for on my med/surg unit you may have somebody coming in with a minor amputation, a hip or knee replacement, and/or an elderly person coming in with dementia.
Q. And, of course, the med/surg unit, I presume, had male patients?
A. And male patients. So that would be different. For male patients.
Q. And what about -- so in moving from the OB unit into a med/surg unit, what is it that a nurse would need to learn or orient to?
A. They may need to leave[sic] some of the medications, especially with the elderly patients, that an OB patient wouldn't be on. They'd have to be educated about medications. Of course, you know, care of any male illnesses, male-specific. On med/surg, you don't have cardiac patients, where in OB you would -- you still could have a cardiac patient. Anybody who was really serious, the cardiac issue, that was pregnant would go to the ICU. The OB nurse would go over and monitor the baby. She wouldn't care for them in the ICU, but she would go over to monitor the baby. So it's actually more difficult to go from med/surg to OB than it is OB to med/surg because the OB nurses work in an emergency-ready all the time atmosphere, because you never know what's coming in. And they have a lot of specialties that they do, where the med/surg unit wouldn't. So I would say -- especially this team of nurses I had, they were excellent. They would -- they could have taken care of me or my family anytime." (T. 1045-46).

Hampton went on to make similar comparison between OB and the Emergency Department, into which Claimant Tina Kille had transferred, and noted that all nurses have basic nursing and assessment skills, heart monitoring, IV therapy and glucometer skills, noting that dispensation of specific medications in the different areas would be something a nurse would need to learn when transferring to another department. (T. 1047-48).

With respect to certifications, Hampton testified that, in addition to RN license, all RNs required basic life support (BLS) and advanced cardiac life support (ACLS), although

back in 2014, ACLS was not required in Med/Surg. (T. 1048-49). Both Hampton and Scherle testified that training and orientation for a new department varied, but could be six to 12 weeks. (T. 1073, 710). In evaluating Scherle's testimony regarding substantial equivalence among areas of health specialization in nursing (T. 710-717), it is instructive to consider the trajectory of her own 43 year career as an RN, which included 20 years in critical care before becoming a staff educator, and labor and delivery nurse manager, and then finally chief nursing officer. (T. 737-738).

It is also worthy of note that RNs in all departments at Salem were in 2014, and are to this day, evaluated annually with the use of the same exact evaluation form. (T. 1191-92; R. Ex. 44 and 45). But perhaps the most persuasive indication of the substantial equivalence between RN positions in the OB department and RNs in other departments of the Hospital is the fact that the five Claimants who accepted transfer to other departments at Salem – Cottrell, Drennan, Driver, Kille, and Kirkwood – all did so with on-the-job training. (T.699-701). At one point in her testimony, Renee Garrison said "A registered nurse is a registered nurse is a registered nurse. There's no other license. There's just certifications and specialties." (T. 415). Exactly. And the law cannot logically – and does not -- limit the universe of substantially equivalent employment by every minute certification and specialty.

b. The Claimants Whose Employment Terminated In June, 2014 Affirmatively Rejected The Transfer Option, Constituting A Voluntary Waiver of Earnings.

The Former Employees could not have been more clear in their testimony about the fact that they had zero desire to accept an RN position at Salem after the OB unit closure. Each of RNs Garrison, Moore, Sibley and Soone expressed in no uncertain terms their lack of any interest in working in another department as opposed to taking a severance package and leaving. Specifically, with regard to each:

- Renee Garrison stated that she was aware of other opportunities within the Hospital, but chose not to pursue them because labor and delivery was her

"specialty" and she was only interested in working in labor and delivery. (T. 386)). She also testified that, although she couldn't recall where or with whom she spoke about severance, she vaguely recalled an individual meeting and "a paper saying if you chose severance…"(T. 397). In response to questioning by Counsel for General Counsel, Garrison that she did not believe she was not equipped to work as an RN in any of the Salem Nursing Departments (T. 413).[5]

- Betty Moore recalled that Salem management said the they could accommodate the OB nurses in another department, but that she did not say she wanted to work anywhere else because she had only ever done OB. (T. 472). She further testified that she understood there would be training associated with transfer to another department but that she "wanted to stick to OB and I thought at that time just for OB". (T. 473).
- Linda Sibley testified that she knew that there were open positions and that the OB nurses would be given first preference for them, but that she chose not to pursue them because OB nursing was her chosen field. In addition she testified that once she chose not to seek one of the open positions at the Hospital, she was given a severance package. (T. 317-318).
- Maria Soone recalled "vaguely" that "you could possibly go to another department". (T. 444). When asked whether she recalled responding, she said, "I did not have any interest in working in anything but labor and delivery. " (T. 445). In addition, although she recalled signing a severance agreement and physically sitting with someone while signing, she could not remember who it was or anything about the conversation. (T. 443).

[5] Garrison's credibility with respect to her recollection regarding specific discussions about transfer opportunities and severance is questionable. On the one hand, she testifies to knowing OB Director Hampton well, and working with her for several years (T. 398) during which time all witnesses acknowledge frequent discussion about the OB closure for more than a year prior to closure. Yet, Garrison testifies that she never spoke with Hampton about what options she might pursue after the closing (T. 398).This is in contrast to Hampton's clear recollection that Garrison rejected her offer of transfer, and had told her she was going to look into Homecare, but wanted to stay in OB. (T. 1036). Garrison's testimony that she was not capable of performing RN work in any area other than OB is also questionable in light of the fact that she applied for work in several other areas and was offered – and rejected -- a fulltime RN position in a rehabilitation center called HealthSouth. (T. 403).

With regard to Jill Cottrell, who transferred to the OR and then resigned after only one week, although she testified that she could not recall whether management at Salem said there were job opportunities at Salem for the OB RNs, or who scheduled her to work in the OR, she obviously knew about, and acted upon, the offer of transfer. (T. 353-54). She testified, in response to the question whether it was her intention to try to work in OR full time, "I wanted – I'd thought about it, but I decided to take the severance and go." (T. 355). She then explained that, because she "just didn't feel comfortable in the OR" and "The CNO had told us that whatever we needed, to let her know", she asked for, and received, a severance package. (T. 356).

Although some of the Former Employees said they could not recall the specifics of Salem's offer to continue working in RN positions at Salem, it is eminently clear that all of them – whether they admitted it freely at Hearing or not -- understood the standing offer, and rejected it out of hand. [i]Counsel for the General Counsel likely will protest that the offers of transfer were not in writing, and not specific enough. But there is no legal requirement that such an offer be in writing, or that it reiterate what every nurse at a small Hospital like Salem already knows: wages, benefits, conditions of employment, policies and promotional opportunities – just like evaluations – are uniform throughout the Hospital. (T. 1188-89; R. Ex. 43, 44, and 45).

Certainly, of key importance in evaluating the question of whether the transfer opportunity was sufficiently clear is the fact that five of the Claimants accepted the offer – Kille to Emergency Department, Drennan to PACU SDS, although she had first selected Med/Surg, Driver to the the Operating Room, Kirkwood to SDS, and of course Cotrell for a short time to the Operating Room. (T. 1033, 1035, 1037, 1042).

Moreover, if, in addition to the acceptance of transfer by five of the Claimants, more proof is needed of the Former Employees' rejection of the transfer opportunity, one need only

review the Agreement reached between Salem and the HPAE upon conclusion of bargaining over the effects of the OB closure in April, 2017, nearly three years after the closure. (GC Ex. 4). It is entitled, "Settlement Agreement…Re: Reopening of the Obstetric Unit", and its entire focus is preferential hiring only in the event that Salem reopens an Obstetric Unit. Despite the virtual impossibility of that eventuality, the fact that the Union never proposed preferential hiring in any other department at Salem can only be explained by the complete and utter lack of interest any of the Claimants had in working anywhere other than OB.

Finally, both Pat Scherle and Nancy Hampton testified credibly that they told the Claimants numerous times, both in meetings and informally, that Salem wanted to keep them employed, and would provide training so that they could orient to RN positions in any department at the Hospital. The fact that neither Scherle nor Hampton could document the dates and times of those meetings and discussions does not make the offer of transfer with appropriate training and orientation any less valid. Although, not surprisingly in such a small Hospital, formality was in short supply, it is obvious from both their language and demeanor on the witness stand that both Scherle and Hampton valued the Claimants as employees, thought highly of their nursing skills, were committed to making a place for them in other departments at Salem, and told them so. (T. 699-702, 705, 721).

Based on all of the foregoing, Salem submits that each of the Former Employees should be limited to the two week minimum guarantee in the Board's enforced Order. The only reason they experienced a moment of lost wages was due to their rejection of the Hospital's offer to transfer them to comparable RN positions in other departments.

B. Even If Backpay Did Not Toll Immediately Upon Separation From Employment With Salem, It Tolled Upon The Failure of the Former Employees To Engage In A Reasonable Search Of Substantially Equivalent RN Positions Available With Other Employers.

In addition to the arguments set forth above concerning the Former Employees' rejection of

substantially equivalent employment at Salem in lieu of separation from employment with severance, Salem submits that, consistent with the factors set forth by the U.S. Supreme Court in *Mastro Plastics* , supra, backpay should be reduced to the extent that each of these Claimants "failed to remain in the labor market, refused to accept substantially equivalent employment, failed to diligently search for alternative work, or voluntarily quit alternative employment without good reason." Id. Here, some or all of the Claimants unreasonably limited their searches to OB positions, failed to search for employment at all for some period of time, rejected substantially equivalent fulltime employment, and/or accepted a position that constituted an abandonment of search.

In St. George Warehouse, 351 NLRB 961(2007), the Board established the standard of proof for backpay hearings. Specifically, the employer bears the burden of persuasion as to an employee's alleged failure to engage in a reasonable search for new work, as well as the burden of producing evidence that there were substantially equivalent jobs within the relevant geographic area, and General Counsel bears the burden of producing evidence that the employee took reasonable steps to pursue those jobs.

1. Thousands of Substantially Equivalent RN Positions Were Available During The Alleged Backpay Period Within the Relevant Geographic Area, And The Claimants' Failure To Pursue Them Tolls Backpay.

The Record here is replete with evidence presented by Respondent of the existence of a staggering volume of substantially equivalent jobs. (R. Ex. 2-4, 22-37, and 39-43). But the General Counsel has failed to establish that the Claimants took reasonable steps to pursue those jobs. Instead, the General Counsel and Charging Party argue that RN jobs in any department other than OB – or Labor and Delivery – are not substantially equivalent, and that, therefore, the Claimants' failure to apply for full time RN positions for which they were plainly qualified is irrelevant. Consistent with the arguments presented in support of the substantial equivalence of RN positions in departments other than OB at Salem, representatives of five area health networks testified credibly that, cumulatively, over a thousand staff RN positions for which the Claimants were qualified were posted and available throughout the duration of the alleged backpay period.

For ease of reference to the type and location of the substantially equivalent RN positions available in the market, summaries of the job posting exhibits in evidence are submitted as "Attachment A" to this Post-Hearing Brief. They reveal that, in each month of the alleged backpay period, no fewer than 115 RN staff positions were posted on the internet with application requirements for which the Claimants qualified. (See, Attachment "A"). Although a review of the Attachment shows that some of the positions were in OB – or Labor and Delivery – the vast majority of them are in departments other than OB. Based on the testimony by independent witnesses from the area hospitals, supported by the performance of RN work by Claimants other than the Former Employees as RNs in areas outside of OB, and the testimony of the Hospital's witnesses, it defies credulity and reason to suggest that the Former Employees had no obligation to explore any of these hundreds of positions.

All of the positions represented on Attachment A offered wages and benefits comparable to, or higher than, the hourly wage rates the RNs earned at Salem (T. R. Ex. 22, 29-35, 43). None of them required a college degree, although some required that the successful candidate obtain a BSN college degree within 3 to 5 years, some with tuition reimbursement. (T. 549). In fact, Claimant Renee Garrison, who ultimately obtained a RN position in Labor and Delivery at Inspira Vineland, did not have a BSN, and is not enrolled in a BSN program, but believes she was hired because of the hospital's need for experienced nurses. (T. 412).

Deborah Gianchetti, Director of Nurse Recruitment at Inspira Vineland and Elmer – two of the larger hospitals closest to Salem, explained that experience is valued in applicants for RN positions in other areas, specifically noting that some of the areas of nursing that don't require experience in that particular area are Medical Acute, Surgical Acute, Cardiac Acute and Observation units. (T. 524-35). In all cases, representatives of the area hospitals testified that wages are based on years of nursing experience, and that experience outside of their own particular hospital systems is credited. (T. 527-8,T. 863, 1149). A comparison of the wage rates in the Record for the RN staff positions shows, with exception of the Genesis nursing home, that wage rates for the substantially equivalent positions were equal to, or higher than, those at Salem. (T. 305, 1148, R. Ex. 29-35, 43).

As stated succinctly by Wanda Smith, Assistant Vice President for Human Resources at Virtua, in explaining the common job essentials that apply to every RN position at Virtua require that "…every registered nurse has to be able to perform an assessment of a patient, administer, monitor, and document therapeutic interventions and regimes, effectively manage rapidly changing situations, participate in clinical decision making, educate patients and families, delegate and monitor care rendered by other members of the department, demonstrate standard precautions, participate in orientation, identify and participate in performance…". (T. 948) She also noted that in 2014, the Virtua staff RN positions required only an RN license, and not a college degree. (T. 929-30).

In addition to General Counsel's position that years of experience specializing in OB excuses the Claimants from the obligation to mitigate losses by applying for other RN positions like those for about which Ms. Smith testified, General Counsel attempted on cross examination of the area hospital representatives – Gianchetti, Hatfield, Ellis, Smith, Moylett, and Johnson -- to support the theory that the Claimants would not have been successful candidates for the open positions – either because of their age, experience limited to OB, preference for internal transfers, or education level. But even assuming as a practical matter that each of the five Former Employees would not have been the best candidate for every single position, with 115 to 221 open positions available every month, is it reasonable to assume that, if they had applied, they would not have been selected for any position? Even if they were not successful 50% of the time, there would still have been at least no fewer than 55 to 110 positions for which they could have applied and been considered every month.

In any event, the Respondent has satisfied its burden of proof that (1) an overwhelming number of staff RN positions were available and posted in the relevant geographic area; (2) the Former Employees' job search efforts were unjustifiably restricted to OB, and therefore neither diligent nor reasonable, and (3) there were a plethora of suitable, substantially equivalent jobs available for RNs with the Claimants' qualifications that could have been secured if they had conducted a reasonable search. See Black Magic Resources, supra, at 721-722; Lloyd's Ornamental & Steel Fabricators, Inc., 211 NLRB 217, 218 (1974); *Associated Grocers,* supra, at 810-811, *Alaska Pulp,* supra; *Arlington Hotel Co.,* supra, at 852-853.

In sum, the General Counsel has failed to satisfy the Region's burden to demonstrate that the Claimants took reasonable steps to pursue the enormous number of posted jobs for which they were plainly qualified. With respect to the issue of geographic proximity, a review of R. Ex. 46 demonstrates that the available positions were all in reasonable commuting distance from the homes of the Claimants, and in fact, closer in some cases to their homes than facilities at which some of the Claimants have chosen to work. (T. 311, 338).

2. **The Claimants' Failure to Initiate Search Immediately Upon Separation From Employment Tolls Backpay**.

The Record reveals no independent evidence that any one of the Former Employees initiated their job searches for several weeks or months following separation from Salem in June, 2014. This delay constitutes a "willful loss of earnings", as described by the U.S. Supreme Court in the seminal case of Phelps Dodge Corp v. Labor Board, 313 U.S. 177, 200 (1941).The vague testimony of the Former Employees that they "called friends", "asked around", and "looked online" does not a diligent search effort make. Far more probative are the searches made by the area hospitals present at Hearing for applications by these Claimants. A review of what they turned up reveals the following:

- Jill Cottrell: Applied to Genesis 9/29/14 (R. Ex. 39) and Inspira 10/8/14 (R. Ex. 3).
- Renee Garrison: Applied to Virtua 9/29/14 (R. Ex. 37) and to Inspira 10/12/14 and 03/09/15 (R. Ex. 3).
- Linda Sibley: Applied to Virtua 11/13/14 (R. Ex. 36) and to Cape Regional Medical Center 12/01/14, stating on her application that she would be available for work 12/26/14. Was hired at Cape Regional 04/08/15, suspended 05/29/15 for failure to update her RN license, and fired June 26, 2015 for insufficient hours. (R. Ex. 23).
- Maria Soone: Applied to Inspira 08/21/14, 10/07/14, 10/21/14, and 03/20/15. (R. Ex. 3).

Although the Former Employees may have initiated their searches sooner than indicated above, the lack of any contemporaneous evidence, coupled with the Region's failure to have obtained affidavits, results in prejudice to Respondent Salem's ability to prove its case. Certainly, Betty Moore must have begun her search before the end of summer, because she began her school bus job were offered jobs in September. However, in the case of the others,

an adverse inference should be drawn in favor of Respondent because of the lack of any proof of diligence in job search. Furthermore, no presumption of reasonable search should attach to the Claimants' receipt of unemployment insurance. It is clear from testimony that compliance with job search requirements imposed by the State of New Jersey was virtually non-existent in the first weeks or months of unemployment.

3. Garrison's Rejection of Substantially Equivalent Employment Tolls Backpay.

As discussed above, all of the Former Employees rejected substantially equivalent employment when they failed to accept transfer to RN positions at Salem that survived the OB closure. Such rejection constitutes a "willful loss of earnings" and should toll backpay. In addition, and in the alternative, should Salem's first position be rejected, uncontroverted testimony shows that Renee Garrison rejected a fulltime position with Healthcare South in late September or early October in favor of a part time position at Inspira Vineland. (T. 403-4). She did not begin working full time until March of 2015. Any backpay computation found to be warranted beyond the two week minimum guarantee for Garrison should be tolled as of the date she rejected the fulltime position, which appears to have been on or about October 14, 2014. (T.416-17).

4. Moore's Acceptance Of Less Remunerative Work At Initiation of Search Constitutes Abandonment of Search For Substantially Equivalent Employment And Tolls Backpay.

According to the Compliance Specification Appendix, Betty Moore's average weekly earnings upon her separation from employment with Salem in June, 2014 were $2,233.21, totaling $29,031.73 per quarter. (GC. Ex. 1(d)). At a base hourly wage rate of $36.65, this weekly average represents approximately 50 - 60 hours worked per week, the variance allowing for various types of premium pay. In September, 2014, Moore began work as a school bus nurse, accompanying a disabled child to and from school on the bus. The position did not require a RN license when she started; a LPN license was acceptable. Moore worked 26.25 hours per week at the rate of $30.00 per hour, for a total gross weekly wage of $787.50 and quarterly earnings during the alleged backpay period ranging from $7,180.80 to $8,627.40. On average, these

quarterly earnings are less than one third of Moore's gross quarterly earnings while employed as an RN at Salem. (T. 463-469; GC Ex. 1(d)).

The government seeks net backpay for Moore of $116,395.66 for the alleged 500 day backpay period, which is comprised of over $20,000.00 for 5 of the 7 quarters at issue. Although Salem's primary position is that, like the other Former Employees, Moore's rejection of a comparable RN position at Salem should limit her backpay entitlement to the minimum guarantee of two weeks of earnings, to the degree this position is not credited, Salem asserts that Moore's acceptance of this part time position at such drastically lower earnings so early in her search for employment constitutes abandonment of the search for, and withdrawal from the market for, substantially equivalent employment, and therefore a willful loss of earnings. Consequently, any entitlement to backpay should be tolled upon acceptance of the school bus job in September, 2014.

In support of this position, the Third Circuit's holding in Tubari Ltd., Inc. v. N.L.R.B., 959 F.2d 451, 455 (3d Cir. 1992) is instructive. Here, the Employer argued that the discriminatees' acceptance of $150 per week, roughly 66% of their weekly wage at Tubari, did not excuse them from their duty to search for interim employment. Therefore, since the discriminatees did not even attempt to seek other work, they failed to mitigate damages and were not entitled to any backpay.

The *Tubari* Court discussed the "lower sights" corollary to the mitigation doctrine, which holds that, after unsuccessfully attempting for a reasonable period of time to secure substantially equivalent interim employment, a discriminatee is required to "lower his sights" by seeking less remunerative work. *See id.* at 1321; Madison Courier II, 505 F.2d at 402-04; NLRB v. Southern Silk Mills, Inc., 242 F.2d 697, 699 (6th Cir.), cert. denied, 355 U.S. 821, 78 S.Ct. 28, 2 L.Ed.2d 37 (1957); Seattle Seahawks and SSI, Inc., 304 N.L.R.B. No. 78 (August 27, 1991); Delta Data Systems Corp., 293 N.L.R.B. 736 (1989). Significantly, the Court stated, "But the duty to lower one's sights arises **only after a reasonably diligent search for employment similar to that lost has been made**… Here Tubari contends that the discriminatees willfully incurred losses by immediately accepting employment that provided significantly less remuneration than they had received from Tubari, an instant lowering of sights". (Emphasis added).

In conclusion, the Court noted, "Finally we note that, although Tubari has not submitted proof that other work was available and it is normally the employer's burden to establish this element of mitigation, as we have indicated above this is irrelevant where, as here, the discriminatees made no search for comparable interim employment**.** *Madison Courier I,* 472 F.2d at 1319; *accord Seattle Seahawks, supra,* 1991 WL 178177, 1991 NLRB LEXIS at *56-*57. See also, Aero Ambulance Serv., Inc. & Teamsters Union Local 617 a/w Int'l Bhd. of Teamsters., 349 NLRB 1314, 1316 (2007).

In the instant case, where the abandonment of search for a substantially equivalent position occurred in the midst of a plethora of available, comparable work, a finding of willful loss of earnings -- or abandonment of search for substantially equivalent employment and removal from the labor market for RN positions -- is even more compelling.

As noted above in the Introduction, "Attachment B" shows the impact of the foregoing alternative arguments on the calculation of backpay for each of the Claimants at issue.

II. The Remedy For The Reassigned Employees Should Be Limited To The Two Week Minimum In The Board's Enforced Order.

The Reassigned Employees – Cottrell, Driver, and Kirkwood – are each responsible for personal decisions relative to any reduction in wages following closure of the OB unit. In the case of Cottrell, as discussed above, and by her own admission, she tried working in the OR at Salem, decided she didn't like it, and chose to resign. For Driver and Kirkwood, as per diems, the issue is slightly different, but the fundamental rationale for their lack of entitlement to backpay beyond the two week minimum is the same. In sum, they each decided for personal reasons to reduce their per diem commitment, and this resulted in either fewer hours, lower wages, or both.

A. **Any Reduction In Hours Worked By Esperanza Driver and Gail Kirkwood In Peri-Operative Services At Salem Hospital Were Attributable To Their Own Choices, Consistent With The Per Diem Policy That Preceded Closure of The OB Unit**.

Both Esperanza Driver and Gail Kirkwood worked at Salem as Per Diem Nurses. (T. 254,296). The Per Diem Policy at Salem Hospital In 2014 consisted of three "tiers", or levels of commitment to a certain number of hours per month. The process for scheduling is that the per diem nurse advised the relevant unit director of when she is available, and the unit director selects which shifts the Hospital would like the per diem RN to work. (T. 254, 297-98, R. Ex. 5). Given the manner in which scheduling occurs, it is worthy of note at the outset that it is impossible to know how many shifts each per diem RN offered three years ago, and as compared to how many shifts they actually worked.

Kirkwood's payroll data shows a small reduction of per diem hours worked when comparing the hours worked in the six months prior to the OB unit closure, and those after. According to Kirkwood, she first went from full time staff to per diem employment at Salem in November, 2013, and also at that time began working a part time RN job at Inspira with benefits. When she first transferred from full time to part time, she made herself available 1 to 2 shifts per week in OB. After the OB unit closed in June, 2014, she transferred to Same Day Surgery ("SDS") – which required only 3 days training and orientation – and for the most part, she only made herself available 1 shift per week at Salem, because a second shift at Salem would have interfered with her schedule at Inspira . (T. 300-303).

Albeit staff nurses worked 12 hour shifts in the OB department and 8 hour shifts in SDS, the choice of the number of shifts to work remained with Kirkwood. The basis for her choice – which she explained was a desire to avoid interference with her work schedule at Inspira – was not a reason of the Hospital's making. Like many other factors that affect individual decision making, that schedule may have been subject to change, as could have been any number of other personal life choices. Salem took no action that reduced her hours after the transfer, and should not be responsible for backpay associated with Kirkwood's personal choices.

Esperanza Driver recalls that she typically worked 2 to 3 shifts per week as a per diem in the OB unit before it closed in June, 2014. (T. 257). She was classified as a "Tier 3" per diem RN, and paid $38.00 per hour. After the unit closure, she transferred to the Operating Room, where she trained in what she described as formal orientation for 3 to 4 months. She was paid at her normal hourly rate of $38.00 per hour throughout the training period. (T. 259). On November 3, 2014, she signed a "Per Diem Agreement", voluntarily changing her status from a "Tier 3" to "Tier 1", which in turn warranted a reduction in her hourly rate to $31.00 per hour. (R. Ex. 5).

Driver claims that the reason she dropped to Tier 1 Per Diem status is that Tier 3 in the OR required a commitment to "call", described in the Agreement she signed as follows: "Tier III per diem employee must agree to work 72 hours per six week schedule to include 96 weekend hours on call, 6 weekdays on call, and 24 holiday hours on call….". (R. Ex. 5). Driver's explanation for why she could not work the call was that she had requested, and was denied, sufficient training – specifically that she "wasn't trained properly to care for certain scenarios that could have presented themselves in the middle of the night". (T. 260).

Driver's claim that her decision to drop to a "Tier 1" per diem at a nearly 20% reduction in hourly pay because she was denied proper training simply does not ring true. First of all, she testified that she still has not returned to "Tier 3" at Salem, even though in addition to working in the OR at Salem, she works in the OR at another hospital. (T. 256, 265). It is not credible that, after 4 months of training 3 years ago, and 3 years in the OR, she still believes she is not properly trained to take "call" at night. Moreover, Nancy Hampton testified that, at the time Driver applied for employment with Salem in 2011, she applied to work in the OR, and Hampton believed she already had OR experience back then. (T. 1042).

Far more likely, despite Driver's claim about insufficient training, is the fact that the commitment to night, weekend, and holiday call required of "Tier 3" per diems in the OR does not fit her lifestyle. She admitted as much at Hearing; when asked "But for the most part, for

your own personal reasons, you preferred to work days", she replied, "Correct, yes". (T. 285). In this connection, Nancy Hampton testified credibly that when she hired Driver as an RN in the OB department in 2011, Driver had actually applied to Salem to work in the OR department, but because she did not want to work the "call" required in the OR , the then current Director of the OR called Hampton to see whether she might be interested in hiring Hope. During the interview, Driver said she did not want to work the required "call" because "she had a child" and "it was difficult for her". (T. 1037-1040).

Hampton went on to explain at Hearing that, although there was sometimes the need for OB unit nurses to come in "on call", the fact that the OB department was scheduled on a 24 hour basis meant the RN scheduled to take "call" was usually someone already scheduled to work on the shift who had been sent home because the census was low, and therefore already in effect scheduled to be at work. (1041-42). This is a marked contrast from an RN who is scheduled to work a 7am to 3pm shift in the OR being required to come in at night or weekend on a moment's notice for an emergency surgery.

With regard to the alleged denial of training, Salem was denied a continuance to produce Jackie Jenkins, the OR Director whom Driver testified is the person who denied the training Driver had requested. Prior to Driver's testimony at Hearing, Salem had no knowledge of Driver's claim that she had reduced from "Tier 3" to "Tier 1" per diem status because of an alleged denial of training. (T. 1128). As stated in the Offer of Proof presented upon denial of the continuance, if she had testified, Jenkins would have said that she wanted Hope to work as many hours as possible, but that Hope told Jenkins she couldn't take "call" at night because of her daughter and that her husband didn't want her to work that many hours. Jenkins would have testified that she had this conversation with Driver more than once, and that she never denied training. Further, she would have stated that Driver already had worked in the OR for different period of time, and that she could not imagine what training she might be lacking that would cause her to say she could not work safely at night "on call". (T. 1124 – 26).

As stated in more detail below in Point IV, the denial of a continuance in order for Jenkins to testify under oath results in severe prejudice to Salem, particularly in circumstances where the government seeks backpay of approximately $34,000.00 for Driver, and Jenkins is the only person who can directly controvert Driver's account of any discussions they had concerning training.

In sum, Driver's testimony that Salem in any way caused a reduction in her per diem earnings following the OB closure by refusing her proper training is simply not credible in the face of the facts and arguments presented above. Her backpay award should be limited to the minimum two-week guarantee set forth in the Board's enforced Order.

lll. The Alleged Backpay Period of 500 Days Is Excessive And Should Be Tolled By The Union's Failure To Bargain In Good Faith And To Commence Bargaining Within Five Days After Receipt Of The Respondent's Notice Of Its Desire To Bargain With The Union.

Among the eventualities that may toll the backpay period under the Board's enforced Order are (1) the Union's failure to bargain in good faith and (2) the Union's failure to commence bargaining within five days after receipt of Respondent's notice of its desire to bargain with the Union. Respondent Salem asserts that both of these eventualities occurred, and should toll backpay. First, the Union failed to bargain in good faith by its failure to advance proposals concerning the OB closure in over a period of nearly one year, despite participating in approximately 16 collective bargaining negotiating sessions. In addition, the Union failed to commence negotiations within five days of Respondent's notice of its desire to bargain with the Union.

A. The Union's Abandonment of Its Demand To Bargain Tolls Backpay And Constitutes a Waiver Of Its Right to Continue Bargaining Over The Effects of The OB Closure.

In December, 2015, the Union, by its Chief Negotiator, Terry Leone, sent Salem two separate demands to bargain: one, dated December 4, 2015 seeking bargaining regarding the effects of the OB closure, and another, dated December 22, 2015 seeking to bargain toward an

initial collective bargaining agreement. (GC Ex. 12 and 14). The first demand did not contain a request for information, but the second one did. Salem responded to the information request by email from its Chief Negotiator, Angela Beaudry, dated January 17, 2016. In the email, Beaudry introduced herself as Chief Negotiator, advised that she would be reviewing the information request with the Hospital, and requested proposed dates for bargaining. (GC 15).

Thereafter, in three separate tranches, Beaudry, who explained that she needed some extra time because she was out on medical leave, transmitted responses to the information request Leone had sent by emails dated February 17, 2016, February 24, 2016, and March 29, 2016. (R. Ex. 7, 8, and 9). The Parties' first collective bargaining session was held on April 11, 2016, and the Union presented a an initial package of proposals on that date. (T. 758, R. Ex. 10). In pertinent part, the HPAE proposal included in a Recognition clause for the single job classification of "Registered Nurse" [6] ; a "Job Posting" provision that defined an internal candidate for inter-departmental transfer as "qualified" if they could function independently after 60 days; and a "Seniority, Layoff, Recall & Job Posting" provision that allowed for inter-departmental "bumping" rights, such that, in the event of layoff, a more senior nurse in one department could "bump" the least senior nurse in another department and essentially take her job. (R. Ex. 10, Pages 1 and 9-14).

Obviously, each of the above referenced provisions in the proposal were relevant to the question of the effects of the OB closure the previous year on the RNs who had worked in that department. Yet, the government's witnesses admitted that the Union never once raised the issue of the effects of the OB closure during monthly bargaining sessions, even as they reached tentative agreement on Job Posting May 9, 2016, considered counter proposals to Seniority, Layoff and Recall on June 9, 2016, and achieved tentative agreement on Seniority, Layoff and Recall on November 18, 2016, including bumping rights. (T. 765-85, R. Ex. 11, 12, and 14).

[6] Note that the Healthcare Rules of the NLRB recognize the single classification of "registered nurse" as an appropriate bargaining unit.

Salem submits that the Union waived its right to bargain over the effects of the OB closure when it abandoned the issue at the bargaining table. See, In re: AT&T Corp., 337 NLRB 689 (2002) where the Board reviewed the question of a union's obligation to bargain continuously in the following manner:

"...Indeed, '[f]ailure of the union to bargain continuously, particularly in the absence of any reason for the failure, constitutes inaction on the part of the union and results in abandonment of its right to bargain." Id. See also Goodyear Tire & Rubber Co., 312 NLRB 674 fn. 1 (1993) (union "must act with due diligence to preserve its request to bargain"; where there was discussion but no agreement on future date for negotiations, "prudence dictates that the Union follow up on its demand."); Bell Atlantic Corp., 336 NLRB 1076 (2001) (union failed to act with due diligence; while the union filed grievances and requested information about a decision to transfer unit work, it waited 4 months to broach the possibility of bargaining about the decision).....

....In sum, under the precedent cited above, a union must exercise due diligence to ensure that its demand to bargain is continuous. Under all the circumstances, we conclude that there was a lack of due diligence on McGrath's part here following the January 22 conference call. Accordingly, we shall dismiss the complaint in its entirety."

The Parties here met at collective bargaining approximately two days per month from April through November, 2016. At Hearing, the government's witnesses – Terry Leone, Fred DeLuca and Marcus Presley – all admitted that they never raised the issue of the effects of the OB closure throughout negotiations, Terry Leone stated on cross examination that the Parties met 12-13 times and she never had any direct communication with anyone at Salem about the effects of the OB closure. (T. 162). Fred DeLuca testified that, although he had "no idea when he attended a bargaining session", he sat in on one or two sessions, and effects bargaining was never discussed because it was still being litigated. (T. 178, 180). DeLuca also testified that no one from Salem ever told either one of them that Salem refused to negotiate about the effects of the OB closure. (T. 186). And Marcus Presley stated multiple times that there was no discussion of the closure of OB during bargaining. (T. 202, 237).

Presley testified that the Union did not make proposals during the course of the 2016 negotiations because it was their understanding that the Hospital was still challenging the decision, and because the Hospital had not responded to information

requests, it was pointless to give a proposal. Yet, Presley acknowledged the lack of any relevant to the outdated outstanding requests for information because the Union already had the bulk of the information requested, and he also acknowledged that the Union routinely made proposals to which they knew the Hospital would not agree. (T. 220-237).

In fact, there was absolutely no reason why the Union could not have advanced proposals concerning the effects of the OB closure while sitting across from each at the bargaining table for nearly a year. The government's witnesses claim they did not do so because the Board's Order had been appealed and the matter was "in litigation". But even under the Union's disputed version of the facts addressed in the next section below, no one from Salem is even alleged to have said anything until July, 2016 about not wanting to negotiate regarding effects of the OB closure because the issue was still being litigated. Presley also testified that the 2016 negotiations were "contract bargaining", and the OB closure is "effects bargaining", as if that should excuse the Union's failure to follow up on its December 4, 2015 demand to bargain. But the Board's Order never defined any such distinction or parameters for bargaining, and the Union's failure to act in furtherance of its demand to bargain constituted a waiver of its right to continue bargaining.

B. The Union's Failure to Commence Bargaining Within Five Days of Salem's Notice of Desire To Bargain Tolls Backpay And Constitutes a Waiver Of Its Right to Continue Bargaining Over The Effects of The OB Closure.

It is undisputed in the Record that Salem's Chief Negotiator, Angela Beaudry, sent HPAE's Chief Negotiator, Terry Leone, an email on June 9, 2016 asking if the Union sought to bargain over the effects of the OB closure. It is also undisputed that the parties met for collective bargaining on that day. (T.774-75). Beaudry testified credibly that she never received either a verbal or written reply to her email, and never heard another word about bargaining the effects of the OB closure until she received a copy of the December 20, 2016 demand to bargain over the issue from Marcus Presley. (T. 788, GC Ex. 21).

In stark contrast to Beaudry's account, the government produced an email purportedly sent by Leone to Beaudry on June 10th in reply to the June 9th request for bargaining, as well as three additional emails purportedly sent by Presley to Beaudry requesting information and bargaining about the effects of the OB closure dated June 22, 2016, July 8, 2016, and July 14, 2016. (GC. Ex. 18, 19, and 20). How to explain this conundrum?

Both Beaudry and Presley acknowledged having had difficulty communicating by email in the Fall of 2016, and not knowing when the issue began. (R. Ex. 18-21). Beaudry testified that she had not begun to coordinate with Presley on any matter of substance before August, 2016. The Record is replete with a history of correspondence between Beaudry and the Union representatives is nearly religious in its promptness, so the notion that Beaudry simply failed to respond in any way to three email transmissions is not tenable. (GC Ex. 29-50, R. Ex. 6-9, 15-21). The only logical conclusion is that, as she testified, Beaudry did not receive the emails.

The government's witnesses could not say why they had failed to say anything to Angela about bargaining the effects of the OB closure when they saw her at negotiations. Presley claims that Beaudry told him in the hallway on July 8th that she would not be bargaining over effects of the OB closure because the matter was in litigation. But Beaudry testified that she had never talked with Presley in the hallway about any matter more substantive than logistics related to bargaining, and certainly Presley's own description of his role as "second chair" in negotiations supports that view. The only means of reconciling the disputed hallway discussion is that Presley confused the OB closure effects with a disciplinary matter that was in litigation, and about which Beaudry had directed him to contact Salem's counsel. (T. R.Ex 16 and 17).

In any event, and without casting aspersions on the good character of any of the players in what otherwise appeared to be nearly a year and a half of good, productive bargaining between the Parties, the bottom line is that Salem requested bargaining about the effects of the OB closure on June 9, 2016, and the Union failed to commence bargaining within five days of that request, effectively tolling backpay. Certainly, the government will argue that the Union

attempted to commence bargaining and the Respondent failed to cooperate. But, against the backdrop of all of the negotiations that took place, including repeated requests by Beaudry to ensure that there were no outstanding issues beyond the contract and other matters she was addressing with Presley, the responsibility for commencing negotiations rests with the Union, and their failure to do so must toll the backpay period.

IV. Salem Was Denied Due Process And Unduly Prejudiced By The Granting of Petitions To Revoke Three Subpoenas Served On Area Hospital Systems, Denial Of A Continuance For The Enforcement of Subpoenas, Denial of A Continuance To Present A Critical Witness, And The Failure of the Region to Timely Investigate And Document The Claimants' Mitigation Efforts.

As discussed at length throughout this Post-Hearing Brief, a critical element of the Respondent's burden is to demonstrate the availability of substantially equivalent RN positions which the Claimants failed to pursue. Salem's only means of obtaining information about available positions and any record of the Claimants pursuing them is by subpoena of records form area hospital systems. At Hearing on December 14th, Your Honor granted petitions to revoke by three area Hospital systems, and denied a continuance for the purpose of seeking enforcement of subpoenas issued to the custodians of record at 19 other area employers of RNs who had simply ignored the subpoenas. This denial deprived Salem of a fair hearing and otherwise violated Salem's due process rights.

Salem was unduly prejudiced in proving its case without benefit of the information that would have been obtained, and respectfully submits, consistent with the Offer of Proof on the Record, that the data and information produced would have helped support the Respondent's case. (T. 1130-1134).

Similarly, as stated in the Offer of Proof with respect to the denial of a continuance to produce witness Jackie Jenkins, Salem was unduly prejudiced by the inability to present a critical witness to rebut testimony by Claimant Driver, and therefore denied its constitutional right to a fair Hearing. (T. 1124-29).

Finally, the Region's failure to obtain any contemporaneous information whatsoever related to the job search activity of the Claimants falls woefully short of the guidance in the Compliance

Casehandling Manual, and resulted in undue prejudice to the Respondent's ability to prove a lack of due diligence in seeking substantially equivalent employment.

CONCLUSION

For all of the reasons set forth above, Respondent Salem respectfully submits that the backpay owed to each of the Claimants in this matter should be limited to the two-week guarantee in the Board's enforced Order.

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Katonah, New York

Respectfully submitted,

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